INDEX

CITATIONS

Cases:	Page
American Construction Co. v. *Jacksonville Railway Co.*, 148 U. S. 372	4
Aspen Mining and Smelting Co. v. *Billings*, 150 U. S. 31	6
Bostwick v. *Brinkerhoff*, 106 U. S. 3	4
Fleming v. *Borders*, 165 F. 2d 101	6
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U. S. 251	4
Hunter v. *Thomas*, 173 F. 2d 810	6
Toledo Scale Co. v. *Computing Scale Co.*, 261 U. S. 399	4
Statutes:	
28 U. S. C. (1946 ed.) 230	6
28 U. S. C. (1948 rev.) 2107	3
Federal Rules of Civil Procedure:	
Rule 59	5
Rule 73, F. R. Civ. P., as amended December 27, 1946, but not effective until March 1948, 329 U. S. 866, 875	6
Miscellaneous:	
Robertson and Kirkham *Jurisdiction of the Supreme Court of the United States*, § 119, pp. 208–210	4

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 241

BEN L. BEETS, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In June 1945, petitioner was found guilty of rape after trial before a court martial convened at Darmstadt, Germany, and he was sentenced to life imprisonment. His sentence was later reduced, first to 30 and then to 18 years' imprisonment, by orders of the Secretary of War (R. 11–12). The present proceeding arose upon a petition for a writ of habeas corpus filed by petitioner in the District Court for the District of Kansas challenging the validity of his conviction (R. 5–10). A hearing was held on January 21 and 22, 1948, at which petitioner testified and adduced the testimony of three other witnesses,

and respondent introduced the record of the court-martial proceedings (R. 86–140). At the conclusion of the hearing the District Court announced its decision (R. 138–140) and entered a decree, dated January 22, 1948, adjudging that petitioner was unlawfully held by respondent and directing that he be forthwith discharged from custody (R. 19). Petitioner was released upon his personal recognizance without surety pending appeal (R. 19–20).

On January 29 and 30, 1948, respondent filed a motion and supplemental motion for a new trial (R. 25–28) and on March 12, 1948, a motion to vacate the decree of January 22 and to permit respondent to adduce additional testimony of persons whose affidavits were attached to the motion (R. 28–74). The latter motion alleged surprise in an amendment of the habeas corpus petition which the court allowed at the opening of the hearing on January 21 (R. 18–19, 87) and in the testimony of the witnesses called on petitioner's behalf, and stated that since the hearing other witnesses had been located who could give pertinent testimony negating the evidence underlying the court's findings and conclusions, entered January 29 (R. 20–25), that petitioner did not have the effective assistance of counsel at his court-martial trial and that the court martial was influenced by higher authority and consequently was not free to render impartial justice (R. 28–38). A hearing on these motions was held on

April 7, 1948 (R. 146–197), upon the understanding that if the court found the additional testimony adduced by respondent sufficient to refute petitioner's contentions it would vacate the decree of January 22 and enter judgment against him on the whole record (R. 147–150, 191–196). The court stated at the conclusion of the hearing, after the government had adduced all evidence available for a new trial (R. 195): "And so, the case is, in effect, retried. * * * what we are doing here is retrying this case" (R. 196). The court explained that it had adopted this course, rather than formally setting aside the decree of January 22 and granting a new trial, in order to obviate remanding petitioner to respondent's custody pending ultimate decision (*ibid.;* see also R. 148). The cause was then continued to afford petitioner an opportunity to bring in additional witnesses (R. 196–197). Thereafter, on June 2, 1948, petitioner filed an "Opposition to Further Proceedings in Said Cause," taking the position that respondent's motions to vacate the judgment and for a new trial would not lie and that the time for appeal had therefore expired (R. 84). On December 30, 1948, without any further proceedings, the court overruled respondent's motions (R. 85).

On February 24, 1949, within 60 days from the denial of these motions (see 28 U. S. C. (1948 rev.) 2107), respondent filed a notice of appeal from the judgment of January 22, 1948, and the

further order of December 30, 1948 (R. 86). Petitioner thereafter moved in the Court of Appeals to dismiss the appeals for lack of jurisdiction (R. 201–205). The motion was denied on May 11, 1949 (R. 206), and it is this action of the Court of Appeals which petitioner asks this Court to review.

The order denying petitioner's motion to dismiss the appeal was only an interlocutory ruling and not a final judgment, since it did not dispose of the whole case on its merits, *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4, and the appeal is still pending in the Court of Appeals. It is true that this Court has power to grant certiorari to review interlocutory as well as final decrees of a court of appeals. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418. However, this power is exercised only in "extraordinary cases," and the fact that the decree sought to be reviewed is not final may, of itself, furnish sufficient ground for denial of the application. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258. Certiorari should not issue to review an interlocutory decree of a court of appeals "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville Railway Co.*, 148 U. S. 372, 384.[1] Clearly,

[1] Robertson and Kirkham, in their work, *Jurisdiction of the Supreme Court of the United States*, express doubt as to the power of this Court to issue certiorari to review "mere

there are here no extraordinary circumstances or matters of urgent public interest such as to justify an exception to the general rule. If the Court of Appeals should reverse the judgment of the District Court, petitioner will then have ample opportunity to seek review here of the order of which he now complains, as well as the merits of his case. In the meantime, he is free on his personal recognizance granted by the District Court immediately following its decree of January 22, 1948.

In any event, it is clear from the summary of the proceedings in the District Court set forth above that the final judgment of the court was embodied in the order of December 30, 1948, overruling respondent's motions to vacate the earlier judgment and for a new trial. The motion and supplemental motion for a new trial were filed within ten days from the entry of the decree of January 22, 1948 (see Rule 59, F. R. Civ. P.), and the motion of March 12, 1948, to vacate that decree was filed within the same term of court and within the period which would otherwise have been allowed

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rulings by the Circuit Courts of Appeals upon motions presented in appeals pending before them, not going to the merits of such appeals," but they argue that "The conceded power of the Supreme Court under that section [240 (a) of the Judicial Code, now 28 U. S. C. 1254 (1)] to review interlocutory decrees and non-final judgments is to be exercised, it is submitted, only in the review of such judgments, decrees or orders as dispose, for the moment, of the whole controversy before the court." § 119, pp. 208–210.

for appeal.[2] The court entertained all these motions, held a hearing on April 7, 1948, which was in effect a continuation of the hearing held on January 21 and 22, and rendered its ultimate decision (see R. 192), based upon the evidence adduced at both hearings, on December 30, 1948, in the form of the order overruling respondent's motions. At the hearing on April 7, the court refrained from vacating the decree of January 22, which it recognized would have been an appropriate step as a preliminary to the reopening of the hearings (R. 148), and as it had the power to do (*Hunter* v. *Thomas,* 173 F. 2d 810, 812 (C. A. 10)), merely as an accommodation to petitioner so that he might continue to enjoy the freedom granted him on his personal recognizance by the decree of January 22. In these circumstances, an appeal prior to the final disposition of respondent's motions would have been premature (cf. *Fleming* v. *Borders,* 165 F. 2d 101 (C. A. 9)), since the decree had not taken final effect for the purposes of appeal (cf. *Aspen Mining and Smelting Co.* v. *Billings,* 150 U. S. 31, 36).

[2] Whether the period was at that time three months (28 U. S. C. (1946 ed.) 230) or 60 days (Rule 73, F. R. Civ. P., as amended December 27, 1946, but not effective until March 1948, 329 U. S. 866–867, 875).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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